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NO. _____

In The
Supreme Court of the United States
October Term, A.D. 1983

—○—
HOWARD WILLIAM MURRAY

Petitioner,

vs.

NEW MEXICO,

Respondent.

—○—
**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW MEXICO**

—○—
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals of New Mexico erred in determining that this Court's decision in *United States v. MacDonald*, 456 U.S. 1 (1982), applied to a six and one-half year delay between actual restraint on initial formal charges and trial on the merits; and

2. Whether the Court of Appeals of New Mexico erred in holding that Petitioner's Sixth Amendment speedy trial rights were not violated where the State did nothing to prosecute the case for almost three years between granting of defense motion to dismiss in March 1978 and the seeking of a new indictment in February 1981.

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**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW MEXICO**

The Petitioner, Howard William Murray, hereby moves the Court to issue its Writ of Certiorari to the Court of Appeals of New Mexico to review the decision of that Court affirming his convictions following a jury trial of two counts of second degree murder and three counts of aggravated assault upon a police officer, and as grounds therefore, states the following:

OPINIONS BELOW

The trial court initially dismissed the indictment against Petitioner for a violation of New Mexico's state law-based speedy trial 6 Month Rule; this ruling was reversed in an unpublished opinion by the Supreme Court of New Mexico. Both the ruling of the trial court and the "Decision on Certiorari" by the New Mexico Supreme Court are printed in the Appendix to this Petition.

After remand for trial by the New Mexico Supreme Court and conviction at trial, the Court of Appeals of New Mexico affirmed Petitioner's convictions in an unpublished opinion. A copy of this decision is likewise printed in the Appendix.



STATEMENT OF JURISDICTIONAL GROUNDS

The Court of Appeals of New Mexico affirmed Petitioner's convictions in an opinion filed on October 13, 1983. A timely petition for review of this decision was filed in the Supreme Court of New Mexico on November 2, 1983 and an Order denying that Petition for Writ of Certiorari in the New Mexico Supreme Court was entered on November 30, 1983. That Order allowed the opinion of the Court of Appeals of New Mexico to become final and further allowed that court to issue its mandate to enforce its judgment and sentence. The mandate of the Court of Appeals was issued on December 5, 1983; Petitioner filed a motion to recall that mandate, and the Court of Appeals of New Mexico recalled its mandate on December 28, 1983.

to allow Petitioner 30 days in which to file his Petition for Writ of Certiorari in the Supreme Court of the United States.

The jurisdiction of this Court is invoked pursuant to 28 USC Section 1257 (3). This petition will be timely filed if presented on or before January 30, 1984, 60 days from the issuance of the Order of the Supreme Court of New Mexico making the decision of the Court of Appeals of New Mexico final.

**CONSTITUTIONS, STATUTES AND
RULES INVOLVED**

United States Constitution, Amendment Six (Speedy Trial Clause)

Rule 37, N.M.R.Crim.P.:

Rule 37. Time limits; time of commencement of trial.

(a) Arraignment. The defendant shall be arraigned on the information or indictment within fifteen days after the date of the filing of the information or indictment or the date of arrest, whichever is later.

(b) Time limits for commencement of trial. The trial of a criminal case or an habitual criminal proceeding shall be commenced six months after whichever of the following events occurs latest:

(1) the date of filing in the district court of the complaint, information or indictment;

(2) the date of arrest of the defendant on a complaint, information or indictment filed in the district court;

(3) the date of arraignment, or waiver of arraignment, in the district court of any defendant arrested out of state;

(4) if the proceedings have been stayed on a finding of incompetency to stand trial, the date an order is filed finding the defendant competent to stand trial;

(5) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed;

(6) in the event of an appeal, the date the mandate or order is filed in the district court disposing of the appeal;

(7) the date of arrest of the defendant after conditions of release have been revoked for failure to appear as required.

(c) Extension of time. The time for commencement of trial may be extended only by the supreme court, a justice thereof, or a judge designated by the supreme court, for good cause shown. The party seeking an extension of time shall file with the clerk of the supreme court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the trial. The petition shall be filed within the six-month period, except that it may be filed within ten days after the expiration of the six-month

period if it is based on exceptional circumstances beyond the control of the state or trial court which justify the failure to file the petition within the six-month period. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Hearings on such petitions will be held in Santa Fe, or such other place as may be designated by the supreme court, on five days' notice to the parties. If the supreme court finds that there is good cause for the granting of an extension beyond the six-month period, it shall fix the time limit within which the defendant must be tried.

(d) Effect of noncompliance with time limits. In event the trial of any person does not commence within the time specified in Paragraph (b) of this rule or within the period of any extension granted as provided in this rule, the information or indictment filed against such person shall be dismissed with prejudice.

(e) Applicability. This rule shall not apply to children's court proceedings or to cases appealed from the magistrate or municipal court. [As amended, effective April 1, 1976, and November 1, 1978.]

STATEMENT OF THE CASE

(1) Facts material to questions presented

The facts material to the questions presented are largely undisputed. The incident giving rise to the charges occurred on February 11, 1976. The charges

stem from allegations that Petitioner murdered two business associates and was then involved in an altercation with the police at the time of his arrest. Petitioner was convicted of two counts of second degree murder and three counts of assaulting the officers. The defense at trial was insanity.

Petitioner was initially indicted in February of 1976. That indictment was voluntarily dismissed by the State and he was quickly reindicted in March of 1976. Relevant proceedings on this indictment include a finding by the trial court at motion hearings that Petitioner was insane as a matter of law. This ruling was reversed in *State v. Murray*, 91 N.M. 154, 571 P.2d 421 (N.M.App.), *cert, denied*, 91 N.M. 249, 572 P.2d 1257 (1977), and the case was set for trial. During this period of time the State applied for and was granted four extensions of time under state speedy trial Rule 37 in which to try Petitioner.

Prior to trial, in March of 1978, this indictment was dismissed on a defense motion because of grand jury irregularities. Over Defendant's objection on speedy trial grounds, the State sought and was granted a fifth Rule 37 extension of time. The predicate for this extension was that the State was either going to appeal the dismissal or reindict Petitioner. The New Mexico Supreme Court allowed the State until September 15, 1978, in which to try the case.

No such trial was had nor was there quick action to reindict. Rather the case languished unexplained from 1978 until February, 1981, at which point the State sought and obtained a new indictment against Petitioner. It was upon this indictment that trial and conviction was had.

In early 1981, Petitioner filed a series of motions in both the old (1976 indictment) and new (1981 indictment) cases. The motion in the old case alleged a violation of state Rule 37 in that the case had not been brought to trial by September 15, 1978, pursuant to the Supreme Court's fifth and final Rule 37 extension. The motions in the new case alleged a variety of due process, speedy trial, and circumvention of Rule 37 contentions.

As part of the factual showing in support of these motions, Petitioner presented the testimony of his wife and explained that her testimony formed the basis for the psychiatric testimony. Mrs. Murray testified that she could no longer remember the events in detail. She was aware of the Supreme Court order requiring trial by September 15, 1978. Once that date came and went, she tried to forget the events, believing that she would no longer be called upon to relate them. Additionally, it was shown that Petitioner's condition improved with the passage of time. Finally, it was shown that the psychiatric experts, who once had independent recollection of Petitioner's condition in 1976, had to rely on their notes, some of which were destroyed. This fact served to significantly lower the quality of the testimony presented in support of the insanity defense.

The trial court dismissed the old case for failure to bring the case to trial within the time allotted by the last extension of Rule 37. The trial court dismissed the new case for circumvention of Rule 37. The State appealed both cases. After a decision by the New Mexico Court of Appeals, the Supreme Court, on the State's petition, finally laid the old case to rest in 1982; it ruled

that the old indictment had died back in 1978 when the State failed to appeal the dismissal order.

With regard to the new case, the State attempted to appeal it to the Court of Appeals on a variety of procedural grounds. It is to be noted that the State's appeal did not challenge the substance of the trial court's decision to dismiss on circumvention of Rule 37 grounds. Rather, the State challenged the trial court's power to grant Petitioner relief on grounds of (1) *res judicata*; (2) failure to give the State a hearing; (3) violation of the State's due process rights; and (4) failure of Petitioner to properly raise the issue, decided by the court, by motion.

The Court of Appeals dismissed this appeal and a subsequent appeal raising the same issues on the jurisdictional ground of the State's failure to file a timely notice of appeal. The case was on a summary calendar for affirmance or dismissal at all times in the Court of Appeals. No transcript was ever filed; no briefs addressed to the merits were ever filed. The only issue before that court concerned whether the State could appeal at all.

Consistent with this one issue before the Court of Appeals, the State brought the case to Supreme Court raising, as its only issue, the question of whether the district court could extend the time for filing notice of appeal in the circumstances of this case. That Court said that it could.

Then, the Supreme Court's Decision on Certiorari proceeded to discuss and decide questions not raised, not briefed, and on which Petitioner was not allowed to be

heard. The opinion found that there could be no state speedy trial rule violation because the State had not voluntarily dismissed the old indictment; it has been dismissed by the granting of a defense motion.

The Court also ruled as follows:

Therefore, we do not see how the district court could base its dismissal on Lucero [*State v. Lucero*, 91 N.M. 26, 569 P2d 952 (Ct.App. 1977)]. Although it is extremely poor judgment to wait for two years to seek a re-indictment because the defendant may have grounds for dismissal for a denial of a speedy trial, it is not a violation of Rule 37 absent a showing that the purpose for dismissal by the State and re-indictment was to circumvent Rule 37.

. . .

Therefore, the Court of Appeals dismissal of the appeal is reversed and the case is remanded to the district court for reinstatement on the trial docket.

State v. Murray, S.Ct. No. 13,923 (filed April 29, 1983), App. 23-24, 26.

In accordance with the Court's mandate, the case was tried. Upon conviction, Petitioner appealed to the New Mexico Court of Appeals. On Petitioner's due process delay and speedy trial issues, the Court of Appeals found them to have been implicitly decided by the above language. Nonetheless, these issues were briefly discussed. On Petitioner's Rule 37 issue, the Court of Appeals found it to have been expressly decided by the above language and entirely refused to discuss it.¹

(2) Presentation of federal questions below.

Petitioner challenged the validity of the indictment leading to his present convictions by motion to dismiss

¹This latter ruling does not present a federal question.

based upon denial of his federal constitutional right to a speedy trial as well as motion to dismiss based upon a violation of New Mexico's speedy trial rule, Rule 37, N.M.R.Crim.P. The trial court chose to deny Petitioner's motion based upon federal constitutional grounds and, rather, ruled that there was a state speedy trial violation based upon the court rule requiring trial within six months of the date of certain events enumerated in the rule. The State appealed the trial court's dismissal order and, after a series of confusing legal maneuvers, managed to present the case to the highest court of the State of New Mexico, the Supreme Court of New Mexico, for a second time. After sweeping away any procedural infirmities in the State's perfection of its appeal, the state Supreme Court decision reversed the trial court ruling based upon New Mexico's six month speedy trial rule and remanded the matter to the trial court for a reinstatement on the trial calendar.

Upon conviction, Petitioner filed his direct appeal to the court of proper jurisdiction, the Court of Appeals of New Mexico, where he squarely presented the arguments and authorities in support of his grounds for dismissal on Sixth Amendment speedy trial theories. Although this was the first opportunity Petitioner had to present his Sixth Amendment speedy trial claim, the Court of Appeals ruled that the New Mexico Supreme Court opinion had implicitly found that there was no violation of federal constitutional law as well as directly and explicitly finding no violation of state speedy trial considerations. Therefore, although Petitioner's claim was fully and vigorously presented, the opinion of the Court of Appeals of New Mexico gave the matter only cursory attention, apparently

because of its view that it was without authority to reach a different result than that implicitly reached by the New Mexico Supreme Court in the earlier decision.

By Petition for Writ of Certiorari to the New Mexico Supreme Court after the unfavorable Court of Appeals decision, Petitioner again raised his Sixth Amendment speedy trial claim directly for the first time in that Court, since no briefs or other presentation of authorities had been allowed by that court in its prior decision. The Petition for Writ of Certiorari in the New Mexico Supreme Court was denied on November 30, 1983.

BASIS FOR GRANTING THE WRIT OF CERTIORARI

1. As to the first question presented for review, the opinion of the Court of Appeals of New Mexico applies this Court's decision in *United States v. MacDonald*, 456 U.S. 1 (1982), to a situation far removed from that held to be proper in the majority opinion as well as the concurrence by Justice Stevens. Therefore, the New Mexico decision is in conflict with the recent speedy trial pronouncement of this Court, and this case squarely presents the opportunity for the Court to limit the application of *MacDonald*, supra, to the situations contemplated in the opinions: namely, where the government has a good faith basis to dismiss charges or otherwise end a prosecution and the accused is truly not under charges or active prosecution. As is pointed out in the argument below, such is not the situation here where the failure of the prosecution to proceed for a close to three year period simply resulted

from prosecutorial negligence and inaction. Furthermore, the opinion in *MacDonald*, supra, impliedly left open the question presented in this case, and state courts are left without guidance as to how to apply these principles.

2. As to the second, and related, question presented for review, this case presents the substantial federal question of whether or not Petitioner's speedy trial rights were violated where the State failed to pursue prosecution after the granting of a defense motion to dismiss for almost three years. Review and disposition of this issue would call into question the entire matter of the application of the Sixth Amendment's speedy trial clause to court-ordered dismissals based upon granting of a defense motion, a lengthy period of delay, and a subsequent reindictment on the same or similar charges arising out of the same transaction.



ARGUMENT FOR ALLOWANCE OF THE WRIT

In reviewing any speedy trial claim under the Sixth Amendment it is elementary that the four factors in *Barker v. Wingo* must be analyzed: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to speedy disposition and; (4) the prejudice to the defendant. In addition, a precondition for use of the Sixth Amendment's speedy trial standards, as contrasted with the due process delay standards under the Fourteenth Amendment, is "actual restraint" or initiation of criminal proceedings of an adversarial nature. There is no dispute that Petitioner was incarcerated immediately upon arrest after the incident in question and held to answer for formal criminal charges in February 1976.

A more complex question arises when one comes to the end of the initial series of prosecutions of Petitioner, culminating in March 1978 with the failure of the State to appeal the trial court's order of dismissal based upon a defense motion alleging grand jury improprieties. The Petitioner was not reindicted until February 1981, almost three years later. The opinion of the Court of Appeals of New Mexico appears to hold, without expressly so stating, that this Court's decision in *United States v. MacDonald*, supra, requires that the period between March 1978 and February 1981 not be counted for purposes of analyzing the length of delay in a speedy trial motion. The Court stated in its opinion:

We have reviewed the record and conclude that it supports the conclusion that defendant was given a speedy trial as required by law. The cases of *United States v. Lovasco* and *United States v. MacDonald* indicate that a speedy trial right attaches only when defendant is being actually restrained or has been formally charged. See also *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1970). To date, New Mexico cases are consistent with *Lovasco* and *MacDonald*. Although no previous New Mexico case has addressed the speedy trial right in a time span involving indictment, dismissal and reindictment, the general rule has been that the right to a speedy trial does not attach prior to initiation of formal charges or placing of actual restraints upon defendant. *Tafoya; Lucero*.

We decide that in the circumstances of this case defendant's constitutional rights were not violated.

The majority opinion of the Court of Appeals of New Mexico provoked a strongly worded and argued dissent from Judge William R. Hendley of that Court. Judge Hendley squarely confronted the *MacDonald* question and, like the

majority opinion, agreed that speedy trial rights attach only when a defendant is being actually restrained or formally charged. But after finding that no New Mexico case had addressed the speedy trial claim where there was an indictment, dismissal of that indictment by granting of defense motion, and reindictment, he then stated what should be patently obvious to even a casual observer of the procedural history of this case:

MacDonald is similar to the present case in that in the *MacDonald* case formal charges previously brought were dismissed, and four years later, defendant was indicted and convicted of the same charges. *MacDonald* states that speedy trial standards do not apply after the government, in good faith, formally drops the charges. There is, however, an important distinction between the present case and *MacDonald*. Here, unlike *MacDonald*, the State never formally dropped charges against defendant following the indictment in cause number 27176. Rather, the case was dismissed by the district court on March 14, 1978. The State never appealed the dismissal and chose instead to reindict defendant almost three years after the March 14, 1978, dismissal. • • •

Because of the special circumstances of this case, there was no way for Petitioner to know that there was any finality to his indictment when dismissed in 1978. He was, therefore, under the spectre of criminal charges all along until actually reindicted in 1981. Judge Hendley's dissent noted the difference in stating that the *MacDonald* holding was based on different facts:

MacDonald states that the period between the formal dropping of the first charges and the subsequent reindictment did not involve speedy trial considerations because during that time "the formerly accused is, at most, in the same position as any other subject of a

criminal investigation." However, in setting forth the interests protected by speedy trial standards, *Marion* stated that these standards serve "to minimize anxiety and concern accompanying public accusation."

• • • Here, in contrast to *MacDonald*, defendant was never relieved of the anxiety, having had probable cause established against him in cause number 27176, because the State never formally informed defendant that it would no longer pursue that cause. Defendant lived in limbo under the stigma of public accusation ever since the indictment in 27176 was returned in March, 1976. By the time the New Mexico Supreme Court rendered the final decision in cause number 27176, the indictment in cause number 33830 had already been brought.

Since the State never formally dismissed the indictment in 27176, it is proper to consider the entire period from March 24, 1976, when 27176 was initiated, to October 13, 1982, when the trial in 33830 began, in determining whether defendant's right to a speedy trial was violated.

The major, and critical, distinction between *MacDonald*, supra, and the present case, is that the government in *MacDonald* had a good faith basis for dismissing charges and ending prosecution of him at the time that he left the service. Although there was some ongoing investigation by the Department of Justice, there was no active prosecution, nor was there any requirement to do so while the matter was legitimately under further study. By contrast, here we have the termination of a particular indictment by the granting of a defense motion to dismiss; the order of the trial court was that the indictment was dismissed without prejudice, meaning that the State could seek to properly reindict the Defendant on the outstanding charges. The State chose not to appeal the order of dismissal through the appellate process in the State of New Mexico

nor did it choose to reindict Petitioner within a reasonable period. Rather, it did nothing for almost three years.

A question not resolved in *MacDonald* is the effect of a court ordered dismissal where the prosecution then does nothing to proceed. Although this Court stated in the opinion, 102 S.Ct. at 1502, after dismissal, "the formerly accused is, at most, in the same position as any other subject of a criminal investigation," the question is whether such status adheres to *all* dismissals or just to those voluntary *nolle prosequis* filed by the prosecution. It is this area where *MacDonald* has left the states unclear as to how to proceed. But see *State v. Bailey*, 655 P.2d 494 (Mont. 1982) (Speedy trial clause applies to period after granting defense motion to dismiss and filing of new information.)

Therefore, if the three period between March 1978 and February 1981 is squarely within the Sixth Amendment's speedy trial requirements, the analysis of the four factors is of a most compelling nature:

(1) *Length of delay.* Judge Hendley's dissent properly characterizes the total period of delay from March 1976 until October 1982 when trial was finally had on the merits. This totals a six and one-half year period. The span of time from March 1976 until March 1978 may properly be attributed to the defendant's motion and an appeal by the State of a favorable ruling in a previous motion. See *State v. Murray*, 571 P.2d 421 (N.M.App. 1977). In March 1978, the trial court granted another of Petitioner's motions to dismiss and there the case languished until February 1981 when reindictment was sought. The Petitioner moved to dismiss the new (1981) indictment on

state and federal speedy trial grounds, and the trial court did so on state rule-based considerations. The State then took the case on a whirl wind of appellate maneuvering, the ultimate result of which was to remand the matter for trial on April 29, 1982. Trial was had in October 1982. Delay of this length raises a presumption of prejudice. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

(2) *Reason for the delay.* It is the almost three year period between March 1978 and February 1981 for which the State must bear its heavy burden in the analysis of this matter. The trial court in dismissing the 1981 indictment under state rule 37 stated that "I find no evidence in any of these hearings as to the bona fides of the delay from 1978 until this indictment." This finding is critical to the inquiry. The State was given sufficient opportunity to provide any justification, if it could, for this period of complete inaction. It could not offer any salient explanation which would require a three year delay. Judge Hendley's dissent analyzes in detail the only oblique explanation offered by the State, that of a conflict in the local prosecutor's office, and finds such explanation to be "without merit".

(3) *Defendant's assertion of his right.* During the course of the initial spate of prosecution from March 1976 until March 1978, the State applied for and was granted several extensions of time by the New Mexico Supreme Court under which to proceed to trial against the Petitioner. Several of these extensions were opposed by Petitioner and the last application, which was granted until September 1978, was opposed specifically under Sixth Amendment speedy trial rights. Thus, the last official act in his old (1976) indictment dealt with Peti-

tioner's assertion of his speedy trial rights. Then, nothing was done until 1981. Because the matter was awaiting action by the State either to appeal the dismissal order or present the matter for reindictment, Petitioner was simply in a "waiting" mode, anticipating the next move of the State's prosecution. During this period Petitioner had no affirmative obligation to bring his matter on for trial or additional proceedings; rather, this was the obligation of the State. *Barker*, supra, 407 U.S. at 527.

(4) *Prejudice to the defendant.* Substantial prejudice was shown by the Petitioner in the courts of the State of New Mexico where critical parts of Mrs. Murray's testimony were lost from her memory because these details which were essential to a reconstruction of the insanity issue were unavailable for trial in October, 1982. In addition, Petitioner was required, in the presentation of his insanity defense, to call the psychiatric doctors and other personnel who had observed him at the time of the incident in 1976 and who had notes of his condition during the period shortly thereafter. These witnesses could no longer testify from present memory but were required to rely upon a rather sterile written record. In some cases even this was impossible because notes had been lost or destroyed when no further action was taken between 1978 and 1981.

CONCLUSION

Petitioner therefore respectfully requests this Court to issue its Writ of Certiorari to the Court of Appeals of New Mexico in its cause number 7045, *State of New Mex-*

ico v. Howard William Murray, and requests the following relief:

1. As to the first question presented for review, vacate the judgment of the Court of Appeals of New Mexico remand for reconsideration in light of *United States v. MacDonald* and the requirement that there be a good faith dismissal of the charges on the part of the government before such a period of delay before institution of new charges is not to be analyzed under the Sixth Amendment Speed Trial Clause.

2. As to the second question presented for review, set the matter for briefs and argument on the applicability of *MacDonald*, supra, to situations where there is a court ordered dismissal, rather than a voluntary dismissal by the government, and whether or not the delay in this case violated Petitioner's rights to a speedy trial under the Sixth Amendment.

Respectfully submitted,

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**APPENDIX TO
PETITION FOR CERTIORARI**

1. *State of New Mexico v. Howard William Murray*, No. 7045: Memorandum Opinion (Court of Appeals of New Mexico)
2. *State of New Mexico v. Howard William Murray*, No. 13,923: Decision on Certiorari (New Mexico Supreme Court)
3. *State of New Mexico v. William Murray*, No. CR 33830: Partial Transcript of Hearing

App. 2

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

No. 7045

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

HOWARD WILLIAM MURRAY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
GERALD R. COLE, JUDGE

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MEMORANDUM OPINION

(Filed October 13, 1983)

LOPEZ, Judge

Defendant appeals his convictions following a jury trial of two counts of second degree murder and three counts of aggravated assault upon a police officer. We affirm.

App. 3

Defendant presents four issues for our consideration:

1. The five-year delay in indicting defendant deprived him of due process because it impaired preservation of his insanity defense and because there was no countervailing reason to justify delay; 2. The more than six and one-half year delay before defendant was brought to trial violated his state and federal constitutional speedy trial rights; 3. Prior appellate proceedings violated New Mexico rules of procedure, due process and jurisdictional requirements; therefore, the merits of the district court's order dismissing for violation of NMSA 1978, Crim.P.R. 37 (Cum.Supp.1983), should be considered and the dismissal should be upheld; 4. The trial court abused its discretion and committed reversible error in denying the defendant's request to offer surrebuttal testimony on the issue of insanity.

FACTS

Defendant's convictions stem from charges that he murdered two business associates and from charges surrounding defendant's eventual arrest which involved a shoot-out with the police. The defense presented was that due to long-time use of alcohol and a recent bout of heavy drinking, defendant was suffering from organic alcohol hallucinosis and was not responsible for his actions.

Because issues 1 to 3 are procedurally based an understanding of this case's procedural history is required. The first indictment, docket number 27039, was returned on February 16, 1976, but the State filed a nolle prosequi in that cause. A second indictment was returned on March 23, 1976. The trial date, initially set to begin on

May 3, 1976, was subsequently rescheduled for August 30, 1976, and October 1976. The reason for rescheduling was to allow the defendant and the State to file motions, and was conditioned on defendant's waiver of his right to a speedy trial. Defendant eventually complied with the condition stating the period of the waiver to be "for a period ending October 31, 1977." The first of a series of Rule 37 extensions was filed by the State around September 24, 1976. The extension was granted to December 24, 1976. For an unexplained reason, defendant filed a request for a definite setting subsequent to his waiver above, for the week of October 25, 1976. A second Rule 37 extension was filed. The extension was granted to February 15, 1977. A third Rule 37 request was filed and was granted to August 15, 1977. Following the motion hearings on defendant's sanity, the district judge dismissed the indictment. The State appealed the dismissal and filed for a fourth Rule 37 extension. This Court reversed the trial court, remanding the case for trial. The Rule 37 extension was granted to March 21, 1978.

Prior to trial, which was set for March 13, 1978, defendant filed two motions to dismiss the indictment. One was granted on the grounds of improper grand jury proceedings. The State's fifth Rule 37 extension notes that the State had not yet decided whether to appeal Judge Maloney's dismissal of the indictment or to seek a reindictment. The extension was granted to September 15, 1978. Nothing of significance appears in the record proper in No. 27176 from the time of the Supreme Court order requiring trial by September 15, 1978, until January 22, 1981, when defendant filed a motion to dismiss with

prejudice for failure to try him by September 15. Judge Maloney again granted a motion to dismiss. The State appealed. Eventually, on certiorari, the Supreme Court concluded that Cause No. 27176 had died when "no appeal was taken from the trial court's March 14, 1978, order dismissing the indictment." The Supreme Court noted that the trial court had no jurisdiction to enter its latest dismissal and that the fifth Rule 37 extension was of no effect because, again, the trial court lost jurisdiction when no appeal was taken from the March 14, 1978 order. Hence, the trial court order was reversed and set aside.

The second indictment under which defendant was finally convicted, was filed on February 10, 1981, charging defendant with two counts of first degree murder and six counts of aggravated assault upon a police officer. The case was eventually assigned to Judge Gerald R. Cole. Defendant filed a number of motions which were addressed in the trial court's order filed on May 7, 1981. The trial court granted the motion to dismiss for circumvention of Rule 37, noting that the State had offered no explanation for the delay from March 14, 1978, to February 10, 1981, in prosecuting defendant. The State appealed the trial court's order to this Court; this Court dismissed the appeal as untimely under Criminal Appellate Rule 202(a). NMSA 1978, Crim., Child Ct., Dom. Rel. & W/C App.R.202(a) (Repl. Pamp. 1983). The State then filed a motion in district court requesting that the time in which to take an appeal be extended pursuant to Criminal Appellate Rule 202(e); the motion was granted. Pursuant to the granting of the State's motion, the State again appealed the prior dismissal of the indictment for circumvention of Rule 37. This Court reversed

the trial court on grounds of lack of jurisdiction to grant the extension; the New Mexico Supreme Court then granted certiorari, reversed this Court on April 29, 1982 and remanded the case for trial. The convictions upon which the present appeal are based occurred at the trial upon remand.

DISCUSSION

ISSUE 1: Due Process And Delay In Bringing The Indictment.

Defendant challenges his convictions on due process and delay in bringing the indictment grounds. There was no reason for the delay, claims the defendant, and such delay prejudiced him in his insanity defense.

The State argues that defendant failed to preserve his right to appeal the due process claim, while defendant asserts the contrary. Our right to review the due process matter becomes academic in light of our conclusion that the New Mexico Supreme Court in its April 29, 1982 Decision on Certiorari (unpublished) implicitly decided this issue when it remanded the present case for trial.¹

In reviewing the trial court's dismissal order, we believe the Supreme Court implicitly decided that defendant's due process rights were not violated. We nevertheless proceed to examine defendant's claim.

¹The Supreme Court said, in part:

Although it is extremely poor judgment to wait for two years to seek a re-indictment because the defendant may have grounds for dismissal for denial of a speedy trial, it is not a violation of Rule 37 absent a showing that the purpose for dismissal by the State and re-indictment was to circumvent Rule 37.

Defendant claims that there was a five-year delay between the event and the second indictment which denied him due process of law. Delay in filing an indictment undeniably involves due process. *State v. Mayberry*, 97 N.M. 760, 643 P.2d 629 (Ct.App.1982); *State v. Santilanes*, 98 N.M. 448, 649 P.2d 516 (Ct.App.1982). The due process violation in pre-indictment delay is prejudice that deprives a defendant of a fair trial on the charge in the delayed indictment. *State v. Hirsch*, 95 N.M. 169, 619 P.2d 845 (Ct.App.1980).

The seminal authority in the instant context is *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), which dealt with a Fifth Amendment due process denial pre-indictment delay. Our courts have interpreted *Marion*, in the Fourteenth Amendment area, to mean:

1. A showing of substantial prejudice is required before one can obtain a dismissal for pre-indictment delay.
2. The elapsed time, in itself, does not determine whether prejudice has resulted from the delay.
3. Substantial prejudice may not exist even when actual prejudice was shown; every delay-caused detriment does not amount to substantial prejudice.
4. Where actual prejudice is shown, the actual prejudice must be balanced against the reasons for the delay in determining whether a defendant has been substantially prejudiced.

State v. Jojola, 89 N.M. 489, 553 P.2d 1296 (Ct.App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976). See also *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978).

In *Jojola*, a general claim of inability to reconstruct events, occasioned by the delay, was held to be insuffi-

cient grounds to establish actual prejudice. A defendant must go further and establish how the delay has precluded him from showing in what respect his defense might have been more successful if the delay had been shorter. *Jojoba*. Because the defendant in *Jojoba* did not carry this burden, the State was not required to justify the delay.

The New Mexico Supreme Court in *State v. Duran*, interpreted "substantial prejudice" to mean actual prejudice to the defendant together with unreasonable delay by the State in prosecuting the case. Actual prejudice to the defendant must be shown before the court will look to the conduct of the prosecution and balance that conduct against the actual prejudice to the defendant. As in *Jojoba*, the defendant in *Duran* failed to carry his burden of showing in what respect his defense might have been more successful had the delay been shorter, so the court was unconcerned with the State's reason for delay.

State v. Mayberry reaffirmed the view that delay in itself does not establish prejudice. Finally, *State v. Santillanes* held that where trial is commenced within the time limitations of Rule 37, delay in itself does not establish actual prejudice. The 32-month delay in that case was not considered oppressive or unreasonable.

The preceding authority and *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977) stand for the proposition that courts in upholding due process claims based on pre-indictment delay must be satisfied that a defendant has shown actual prejudice to his defense due to the delay.

Defendant claims that the delay involved here prejudiced him in that he was unable to adequately present his insanity defense. This type of prejudice, if it exists, is the other kind of substantial prejudice discussed in *Jojoba*. Such prejudice, if proved, would serve to deprive defendant of due process and a fair trial and is, therefore, reviewable as fundamental error. See, e.g., *Smith v. State*, 79 N.M. 450, 444 P.2d 961 (1968); NMSA 1978, Crim., Child Ct., Dom. Rel. & W/C App. R. 308 (Repl. Pamp. 1983).

Our next inquiry is whether defendant has established sufficient prejudice. It is clear that despite the delay in prosecuting the present case, defendant was not precluded from presenting his insanity defense. The same individuals—defendant's wife and the three psychiatrists—who observed defendant's behavior around February 11, 1976 were available as witnesses when trial was finally held. The psychiatrists' observations were preserved in their notes and reports written at the time of their observations. Mrs. Murray's testimony certainly established that defendant was acting quite irrationally shortly before the incidents charged. There is no good reason to believe that the most essential aspects of the testimony presented on behalf of defendant's insanity defense were substantially different in 1982 than they would have been at an earlier date. Defendant clearly presented sufficient evidence to support an inference that he was insane on February 11, 1976, if the jury had chosen to so conclude.

Despite defendant's claims to the contrary, the transcript shows that he was able to present a rather substantial case in support of his claim of insanity. The

State presented one witness to rebut defendant's insanity claim. The evidence as to defendant's sanity was therefore conflicting. The jury resolved the conflict against defendant. Conflicts in the evidence are properly for the jury to decide. *See, e.g., State v. Lankford*, 92 N.M. 1, 582 P.2d 378 (1978). Defendant's claim of prejudice should be rejected because the transcript indicates that he received a fair trial.

We conclude that the defendant's challenge to his convictions under due process must fail.

ISSUE II: Whether The More Than Six And One-Half Year Delay Before Defendant was Brought to Trial Violated His State And Federal Constitutional Speedy Trial Rights.

Defendant also challenges his convictions on grounds that he was not given a speedy trial, as provided by State and Federal constitutions. Consistent with our opinion on the due process issue, we conclude that the New Mexico Supreme Court considered this issue when it remanded the case for trial.² Nevertheless, we will discuss it briefly.

We state initially that while a due process claim attaches to inordinate delays in general, *Lovasco*, or to a claim under any applicable statute of limitations, the Sixth Amendment right to a speedy trial arises only after charges are pending. *MacDonald*.

In determining whether a criminal defendant has been denied his right to a speedy trial, we apply a balancing test in which the conduct of both the prosecutor and the

²See *supra* note 1 and accompanying text.

defendant is weighed. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 182, 33 L.Ed.2d 101 (1972). The factors this Court must consider in applying this test include the following: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. See, e.g., *State v. Johnston*, 98 N.M. 92, 645 P.2d 448 (Ct. App. 1982); *State v. Powers*, 97 N.M. 32, 636 P.2d 303 (Ct.App.1981); *State v. Lucero*, 91 N.M. 26, 569 P.2d 952 (Ct.App.1977); *State v. Tafoya*, 91 N.M. 121, 570 P.2d 1148 (Ct.App.1977). The length of delay is the first consideration and until there is a delay which is presumptively prejudicial, it is not necessary to consider the other facts in the balancing test. Once the presumption of prejudice resulting from delay is established, all of the facts in the balancing test must be considered together; delay in itself does not establish denial of the speedy trial right. *State v. Libero*, 91 N.M. 780, 581 P.2d 873 (Ct.App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978).

We have reviewed the record and conclude that it supports the conclusion that defendant was given a speedy trial as required by law. The cases of *United States v. Lovasco* and *United States v. MacDonald* indicate that a speedy trial right attaches only when defendant is being actually restrained or has been formally charged. See also *United State v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1970). To date, New Mexico cases are consistent with *Lovasco* and *MacDonald*. Although no previous New Mexico case has addressed the speedy trial right in a time span involving indictment, dismissal and reindictment, the general rule has been that the right to a speedy trial does not attach prior to initiation of formal charges or placing of actual restraints upon defendant. *Tafoya*; *Lucero*.

We decide that in the circumstances of this case defendant's constitutional rights were not violated.

ISSUE III: Due Process And The Validity Of The Final Supreme Court Decision.

Under this point defendant challenges his convictions on grounds that perhaps the Supreme Court of New Mexico was incorrect in reversing the trial court's dismissal order. Under *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973), we are bound by the Supreme Court decision, regardless of whether or not we agree with it. Having explained our support of the Supreme Court decision above, we have nothing further to say on this point.

ISSUE IV: Failure Of The Trial Court To Allow Defendant To Present Surrebuttal.

At trial, the State presented the testimony of Dr. Jay Fierman to rebut defendant's evidence that he was insane at the time of the crimes charged. Fierman testified that the emergency room report addressing defendant's behavior when he was taken to the emergency room at Bernalillo County Medical Center, subsequent to his apprehension by police, states that defendant's behavior at that time was intermittently berserk and cooperative. Fierman testified that there was nothing in the emergency room report to substantiate a diagnosis of psychosis when defendant was in the emergency room.

Following Fierman's testimony, defendant sought to present surrebuttal evidence. In particular, defendant wished to present Officer Frazee as a witness who would testify; 1) that defendant was continually trying to jump out of bed after being handcuffed to the bed rails in the emergency room; and 2) that defendant tried to bite

the handcuffs which restrained him. In support of his tendered surrebuttal, defense counsel argued that the tendered evidence should be admitted to rebut Fierman's statement that there was nothing in the emergency room statement to support the use of the word "berserk" in describing defendant's behavior. The court refused the tender, reasoning that 1) the offered evidence was nothing new because defendant himself had placed in issue what occurred in the emergency room when defendant offered the testimony of Officer Bobby Foster, and 2) because defendant could not get a second chance to establish what had occurred in the emergency room. The testimony of Officer Bobby Foster was presented by defendant, and that testimony was not helpful to defendant since Foster essentially stated that defendant was able to maintain a conversation with Foster after being arrested.

On appeal, defendant states that the tender was of testimony intended to point out places in various reports relied upon by Fierman where insane or delusional behavior was manifest. Defendant claims that rebuttal evidence should be admissible as of right when offered for impeachment purposes. Here, argues defendant, the rebuttal testimony was offered to attack Fierman's assertion that "no evidence of insanity appeared in the document which formed the sole basis of his opinion."

The State argues that the offered testimony was merely cumulative, not serving to rebut anything new offered in rebuttal. In addition, the State argues that the testimony offered in surrebuttal was actually evidence of defendant's state of mind which should have been offered during defendant's case-in-chief and, therefore, the trial

court did not abuse its discretion in denying such evidence in surrebuttal.

In New Mexico, the general rule applicable under circumstances of this type was best set forth in *State v. Doe*, 99 N.M. 456, 659 P.2d 908 (Ct.App.1983), as follows:

If evidence sought to be introduced on surrebuttal is not strictly surrebuttal, but merely cumulative or confirmatory, its admission is within the discretion of the trial court. A trial court does not automatically abuse its discretion by permitting a witness to be called on rebuttal but refusing to permit a witness on surrebuttal.

On the other hand, a defendant should always be permitted to introduce in surrebuttal such evidence as tends to meet new matter introduced by the prosecution on rebuttal. (Citations omitted).

We conclude that since defendant's tender of surrebuttal evidence was offered to rebut evidence which was never offered on rebuttal, it was proper for the trial court to deny admission of the tendered evidence.

We conclude that the trial court did not abuse its discretion in denying defendant's request to offer the surrebuttal testimony on the issue of insanity.

The judgment and the convictions of the trial court are affirmed.

IT IS SO ORDERED.

/s/ RAMON LOPEZ, Judge

I CONCUR:

/s/ C. FINCHER NEAL

WILLIAM R. HENDLEY, J. (Dissenting)

HENDLEY, Judge (Dissenting)

I dissent. I disagree with the majority, both as to form and substance. As to form, this should not be a memorandum opinion. Even as discussed by the majority, it is a matter of first impression. As to substance, my discussion follows and I would hold that defendant was denied his right to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution and Article II, Section 14 of the Constitution of the State of New Mexico.

The State contends that the speedy trial issue was not properly preserved and that the law of the case doctrine precludes defendant from now raising the speedy trial issue. The basis for the State's claim is that, although defendant expressly asserted his right to a speedy trial by a motion in district court, he complained only of the period of time between the dismissal of the earlier indictment in cause number 27176 and reindictment in cause number 33830. Our case law indicates that only the time after the filing of formal charges or the time during which actual restraints are placed on a defendant may be considered for speedy trial purposes. *State v. Tafoya*, 91 N.M. 121, 570 P.2d 1148 (Ct.App.1977). Defendant's pretrial motion was premature if only the period after an indictment up to the start of trial can be considered. *Tafoya*. The discussion of defendant's speedy trial issue, however, involves considerations never before addressed in this jurisdiction. As will be seen, defendant was not likely to have properly raised his speedy trial issue without the benefit of the principles discussed below. Under the circumstances, defendant's speedy trial issue is properly addressed on appeal on the grounds that an issue can be addressed by the appellate court based on circumstances

becoming known after the trial court lost jurisdiction. NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 308 (Repl.Pamp.1983). Defendant raised the general speedy trial issue in his pretrial motion. That was sufficient to preserve the issue for review under the circumstances.

The New Mexico Supreme Court's decision reversing Judge Cole's dismissal of cause number 33830 did not necessarily decide the speedy trial issue, when existing New Mexico precedent suggested that the issue was premature at the time of the Supreme Court decision.

In determining whether a criminal defendant has been denied his right to a speedy trial, it is necessary to apply a balancing test in which the conduct of both the prosecutor and the defendant is weighed. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The factors to be considered in applying the balancing test include the following: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of his right; and 4) prejudice to the defendant. *E.g. State v. Johnston*, 98 N.M. 92, 645 P.2d 448 (Ct.App. 1982). The length of delay is the first consideration and, until there is a delay which is presumptively prejudicial, it is not necessary to consider the other facts in the balancing test. *Tafuya*. Once the presumption of prejudice resulting from delay is established, all of the facts in the balancing test must be considered together; delay in itself does not establish denial of the speedy trial right. *State v. Libero*, 91 N.M. 780, 581 P.2d 873 (Ct.App.1978).

A. *When the Speedy Trial Right Attached*

United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982), and *United States v. Lovas-*

co, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), indicate that a speedy trial right attaches only when defendant is being actually restrained or has been formally charged. See also *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). New Mexico cases are consistent with *MacDonald* and *Lovasco*. Although no previous New Mexico case has addressed the speedy trial right in a time span involving indictment, dismissal and reindictment, the general rule has been that the right to a speedy trial does not attach prior to formal charges or actual restraints. *Tafoya*; *State v. Lucero*, 91 N.M. 26, 569 P.2d 952 (Ct.App.1977).

MacDonald is similar to the present case in that in the *MacDonald* case formal charges previously brought were dismissed, and four years later, defendant was indicted and convicted of the same charges. *MacDonald* states that speedy trial standards do not apply after the government, in good faith, formally drops the charges. There is, however, an important distinction between the present case and *MacDonald*. Here, unlike *MacDonald*, the State never formally dropped charges against defendant following the indictment in cause number 27176. Rather, the case was dismissed by the district court on March 14, 1978. The State never appealed the dismissal and chose instead to reindict defendant almost three years after the March 14, 1978, dismissal. The fifth and final Rule 37 extension granted by the Supreme Court in cause number 27176 was never acted upon by the State. Judge Maloney again dismissed 27176 by order filed February 16, 1981. In the appeal of that dismissal, the New Mexico Supreme Court noted that there was nothing to dismiss by the time of the February 16, 1981, order, because the case had already been dismissed by

the prior order filed March 14, 1978. It was not until the New Mexico Supreme Court's final decision addressing cause number 27176 that defendant could be said to be finally aware that 27176 was of no significance.

MacDonald states that the period between the formal dropping of the first charges and the subsequent indictment did not involve speedy trial considerations because during that time "the formerly accused is, at most, in the same position as any other subject of a criminal investigation." However, in setting forth the interests protected by speedy trial standards, *Marion* stated that these standards serve "to minimize anxiety and concern accompanying public accusation." *Marion* distinguishes between the problem of inordinate delay which serves to prejudice a defendant in the presentation of his defense which is properly addressed as a matter of due process, and the problem of serious interference with liberty during the period of delay which is properly addressed as a Sixth Amendment matter. See also *State v. Crump*, 82 N.M. 487, 484 P.2d 329 (1971); *Rayburn v. Nash*, 78 N.M. 385, 431 P.2d 874 (1967). Here, in contrast to *MacDonald*, defendant was never relieved of the anxiety, having had probable cause established against him in cause number 27176, because the State never formally informed defendant that it would no longer pursue that cause. Defendant lived in limbo under the stigma of public accusation ever since the indictment in 27176 was returned in March, 1976. By the time the New Mexico Supreme Court rendered the final decision in cause number 27176, the indictment in cause number 33830 had already been brought.

Since the State never formally dismissed the indictment in 27176, it is proper to consider the entire period

from March 24, 1976, when 27176 was initiated, to October 13, 1982, when the trial in 33830 began, in determining whether defendant's right to a speedy trial was violated.

B. Four Factor Balancing Test

Since defendant lived under the onus of public accusation from March 24, 1976, until October 13, 1982, I would hold that that is sufficient to raise a presumption of prejudice. *State v. Tafoya*; *Barker v. Wingo*; *United States v. Marion*.

It should be noted that delay for the purpose of taking appeals is not generally considered adequate grounds for asserting violation of time rules. See *State v. Padilla*, 92 N.M. 19, 582 P.2d 396 (Ct.App.1978). A review of proceedings shows that an extraordinary number of appeals took place before the present case went to trial. Of the six-and-one-half years being considered, however, the prosecution against defendant remained dormant for two years and eleven months from March 14, 1978, when the case was dismissed because of improper grand jury proceedings, to February 10, 1981, when the present indictment was filed. As can be seen in the majority's statement of facts, much of the delay following reindictment was directly related to the unexplained delay during the period of dormancy. The record is somewhat sparse regarding the precise reason for the period of dormancy. Apparently, a conflict existed in the district attorney's office as to whether to proceed with the prosecution against defendant. The State suggests that the conflict may have been caused by the fact that defendant's attorney, Scott McCarty, who had

represented defendant in cause number 27176, and who subsequently represented him in cause number 33830, worked as a prosecutor in the Second Judicial District from July, 1978, to September, 1979. However, the record does not show that Mr. McCarty was ever questioned as to his role in any conflict which might have existed in the district attorney's office during the period of dormancy. See *State v. Mata*, 88 N.M. 560, 543 P.2d 1188 (Ct.App.1975). Even if the State's allegations were true, such an explanation is not adequate to justify a delay of two years and eleven months during which defendant could truly be said to be in limbo. Even if Mr. McCarty had a conflict of interest, he was not the only prosecutor in the State of New Mexico. That fact should not relieve the State of its burden of trying cases in an expeditious manner. The State's explanation for the two-year-and-eleven-month delay is without merit.

The question of assertion of the right to a speedy trial has been discussed above under the preservation issue.

I would also hold that defendant made a showing of substantial prejudice. This aspect deals with loss of certain parts of Mrs. Murray's testimony—details which were essential to a reconstruction of the insanity issue.

Balancing the foregoing factors, I would hold defendant was denied his right to a speedy trial.

Accordingly, I dissent.

/s/ WILLIAM R. HENDLEY
WILLIAM R. HENDLEY, Judge

App. 21

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 13,923

(Filed April 29, 1982)

STATE OF NEW MEXICO,

Petitioner,

vs.

HOWARD WILLIAM MURRAY,
a/k/a BILL MURRAY,

Respondent.

DECISION ON CERTIORARI

The defendant was indicted on two counts of murder in the first degree and six counts of aggravated assault upon a police officer.

The defendant moved for dismissal of the indictment which the trial court granted. The State then appealed to the Court of Appeals. The Court of Appeals assumed jurisdiction over the cause and placed it on their summary calendar. When it was discovered that the appeal was filed one day late, the Court of Appeals then dismissed the appeal for lack of jurisdiction. The State filed a petition for certiorari with this Court which was denied. The State immediately made a motion for an extension of time under New Mexico's Criminal Appellate Procedure Rule 202(c), N.M.S.A. 1978, which was granted by the trial court. The State then filed a new

notice of appeal within the time allowed under the extension. The Court of Appeals again dismissed the appeal. We granted certiorari; and we reverse the Court of Appeals.

The issue is:

Does the district court have jurisdiction to extend the time for filing a notice of appeal pursuant to Rule 202(c) after mandate was issued from the Court of Appeals dismissing the appeal because of an untimely notice of appeal?

On March 24, 1976, the defendant was first indicted in Bernalillo County criminal cause No. 27176. After numerous pre-trial motions and delays resulting in a number of Supreme Court extensions under Rule 37, this matter was set for trial on March 14, 1978.¹ In response to a defense motion, the district court dismissed the case *without prejudice* before trial on the 14th. The reason for the dismissal was that there had been unauthorized persons in the grand jury room during the presentation of evidence which violated the rule announced by this Court in *Davis v. Traub*, 90 N.M. 498, 565 P.2d 1015 (1977).

On March 17, 1978, the State filed a motion to amend the order dismissing the case so that the State could consider appealing the dismissal. Also, on March 17, 1978, the State filed a petition for a Rule 37 extension, to protect themselves if the State decided to appeal. However, the trial court never ruled on the motion; and the

¹A fourth Rule 37 extension granted the State until March 21, 1978, to try the case.

State never appealed. The Supreme Court, however, granted the State an extension until September 15, 1978, in which to try the case.

In January, 1981, a target letter was sent to the defendant telling him that the State would seek re-indictment. After receiving the letter, the defendant sought a temporary restraining order from the district court to prevent the State from seeking a re-indictment. The judge denied the request and ruled that there was no bar to a re-indictment.

On February 9, 1981, the grand jury indicted the defendant on two counts of murder in the first degree and six counts of aggravated assault on a police officer in Bernalillo County criminal cause No. 33830.

On May 7, 1981, this new indictment was dismissed for circumvention of Rule 37 based upon the case of *State v. Lucero*, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977). In *Lucero*, the Court of Appeals, relying on *State Ex Rel. Delgado v. Stanley*, 83 N.M. 626, 495 P.2d 1073 (1972), ruled that in the event that the State does not proceed with the prosecution under a first indictment or information, they must be prepared to show that their proceeding under a subsequent indictment or information was not being pursued to circumvent the operation of this Court's Rule 37 that requires trials to commence within six months.

The record is clear in this case that the first indictment was dismissed upon *defendant's* motion based upon the presence of an unauthorized person in the grand jury. Therefore, we do not see how the district court could base its dismissal upon *Lucero*. Although it is

extremely poor judgment to wait for two years to seek a re-indictment because the defendant may have grounds for dismissal for denial of speedy trial,² it is not a violation of Rule 37 absent a showing that the purpose for dismissal by the State and re-indictment was to circumvent Rule 37. *State v. Lucero, supra*.

Also, on May 7, 1981, the order of dismissal was sent to the special prosecutor in Roswell.³ The order of dismissal was received by the special prosecutor on May 12, and the notice of appeal was mailed to the district court in Albuquerque on May 15. The notice was docketed and filed by the clerk's office on May 19.⁴ The Court of Appeals assumed jurisdiction over the cause, and then dismissed the case in a memorandum opinion filed July 14, 1981. The dismissal was because the notice of appeal was not timely filed. N.M.R. Crim. App. 202(a), N.M.S.A. 1978. Certiorari was denied by the Supreme Court on August 24, 1981.

On receiving notice that certiorari had been denied, the special prosecutor filed a motion to extend the time in which to file a notice of appeal in district court pursuant to Rule 202(c). Rule 202(c) reads:

Upon good cause shown the district court may, before or after the time has expired, with or without

²The trial court denied a motion to dismiss for violation of the defendant's right to a speedy trial.

³Mr. Robinson, the district attorney, had appointed Mr. Ronald Walker, an attorney outside the district attorney's office, as special prosecutor because of a conflict that arose after the district attorney's hiring of an attorney who had previously been in the law firm that represented the defendant.

⁴The last day for filing a notice of appeal was Monday, May 18, 1981.

motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by these rules.

After a hearing on September 15, 1981, the district court judge found good cause for the extension and granted the extension for thirty days from the expiration of the time otherwise prescribed by these rules for filing a notice of appeal from the court order of dismissal. The special prosecutor then filed the notice of appeal the same day. On October 15, 1981, the Court of Appeals by memorandum dismissed the appeal, holding that "[n]othing in the opinion and mandate [on the previous dismissal] conferred any jurisdiction upon the district court to grant an extension of time for taking an appeal."

When a notice of appeal is not timely filed, the appellate court is without jurisdiction to hear the case; thus, the appeal must be dismissed. *Rice v. Gonzales*, 79 N.M. 377, 444 P.2d 288 (1968). Rule 202(c) requires that the motion for extension of time must be made within thirty (30) days from the time expired for filing a notice of appeal. The question then becomes whether this thirty (30) day period is tolled when the case was in the appellate courts.

When an appeal is taken:

[u]pon the entry of the order allowing an appeal and the giving of the supersedeas bond the trial court *lost jurisdiction* of the case except for the purpose of perfecting the appeal to this court. [Emphasis added.]

Veale v. Eavenson, 52 N.M. 102, 104, 192 P.2d 312, 314 (1948); *State ex rel. Bell v. Hansen Lumber Company, Inc.*, 86 N.M. 312, 523 P.2d 810 (1974); *State v. White*, 71

N.M. 342, 378 P.2d 379 (1963). "[E]xcept for the purpose of perfecting the appeal" is defined in *Abeytia v. Spiegelberg*, 20 N.M. 614, 617, 151 P. 696, 697 (1915).

☛ If it be conceded that district court, by the allowance of the appeal, lost jurisdiction of the cause, except for certain specified purposes, for instance, as the setting and signing of the bill of exception, statutory provisions governing which exist, it must necessarily follow that the trial court could not entertain a motion to dismiss the appeal, and that the clerk of that court, by accepting a filing an unauthorized motion, could not make such motion a part of the record on appeal. . . .

Therefore, once the notice of appeal was filed in the Court of Appeals, the district court had very limited jurisdiction until August 24, 1981 when this Court denied certiorari.

Once an appeal is taken, procedural time limitations are stayed until after a decision by the appellate court is made. *See State v. Padilla*, 92 N.M. 19, 582 P.2d 396 (Ct. App.), *cert. denied*, 92 N.M. 180, 582 P.2d 396 (1978).

Although procedural rules must be followed to provide orderly disposition of cases, we have consistently followed a policy of construing procedural rules liberally. This is done "to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice." (Citation omitted.) *Olguin v. State*, 90 N.M. 303, 305, 563 P.2d 97, 99 (1977); *State v. Baca*, 92 N.M. 743, 594 P.2d 1199 (Ct. App. 1979).

Therefore, the Court of Appeals' dismissal of the appeal is reversed and the case is remanded to the district court for reinstatement on the trial docket.

This case is not to be published nor cited as precedent.

IT IS SO ORDERED.

/s/ WILLIAM RIORDAN, Justice

WE CONCUR:

/s/ MACK EASLEY, Chief Justice

/s/ H. VERN PAYNE, Justice

/s/ WILLIAM R. FEDERICI, Justice

DAN SOSA, JR., Senior Justice, Dissenting.

App. 28

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

NO. CR 33830

STATE OF NEW MEXICO,

Plaintiff,

vs.

WILLIAM MURRAY,

Defendant.

PARTIAL TRANSCRIPT OF HEARING

JUDGE COLE: There is a Motion to Dismiss for failure to grant a speedy trial under the Constitution of the United States, the Sixth Amendment, as incorporated into the Fourteenth and I assume under the Constitution of, Constitution of the State of New Mexico. I have balanced the four items discussed in the various cases and I will deny that motion. There is a Motion to Dismiss as to Double Jeopardy. I will deny that motion. There is a Motion to Dismiss certain counts because of improper comments or directions to the Grand Jury and ah, Mr. Bloom, there was some cases about vindictiveness. Ah, one of the cases you gave me discussed vindictiveness.

MR. BLOOM: Well, there's a motion on vindictiveness.

JUDGE COLE: Are they two separate motions?

MR. BLOOM: Yes, Your Honor.

JUDGE COLE: Alright. I will deny both of those

motions. There is a Motion to Dismiss under Rule 37. I have read that case and I can, or I have read the cases, I've, and it is the Court's understanding that when there is a delay between a first prosecution and a second prosecution under *State v. Lucero*, that the burden is shifted to the State to explain the bona fides of the delay. I find no evidence in any of these hearings as to the bona fides of the delay from 1978 until this indictment. Based upon the Court's determination that that case ah, shifts the burden to the State, the State loses and I will dismiss the case as not being prosecuted properly under Rule 32 [Rule 37] and *State v. Lucero* is the case.

MR. BLOOM: Give me a cite (unintelligible)

JUDGE COLE: 91 N.M. 26. You ought to be able to clear up all of the errors I've made in one appeal. All of your motions are (unintelligible).

MR. BLOOM: Thank you, Your Honor.

APR 17 1984

No. 83-1232

ALEXANDER E. STEVAS
CLERK

IN THE
Supreme Court of the United States

October Term, 1983

HOWARD WILLIAM MURRAY,
Petitioner.

v.

NEW MEXICO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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April 17, 1984

QUESTION PRESENTED

Whether, under *United States v. MacDonald*, 456 U.S. 1 (1982), the time between dismissal of an indictment and the subsequent re-indictment on charges similar to those in the earlier indictment may be considered in determining an alleged violation of rights under the Speedy Trial Clause where the dismissal was initiated by a defendant's motion to dismiss, the State took no appeal from the dismissal, and the defendant was not under actual restraints or subject to criminal prosecution during the period.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, New Mexico, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the court of appeals of New Mexico in this case. The opinion is contained in the appendix of the petition.

STATEMENT OF THE CASE

A statement of the case is set out in the petition. Respondent, however, is not satisfied with its presentation and in particular with its mischaracterization of Respondent's actions, i.e., "confusing legal maneuvers" (Petition at 10). Another statement of the case, setting out the facts material to this Court's consideration of Petitioner's speedy trial claim, is therefore necessary.

Three indictments were brought against Petitioner. The first one was returned in February, 1976 in cause no. 27039. Respondent filed a nolle prosequi to that indictment. (2/18/77, Tape 1A at 265; R. 27176 (Ct. App. 5064) at 44, 51).

A second indictment in cause no. 27176 was returned on March 24, 1976. Trial was originally set for May 3, 1976 and then re-set for August 30, 1976 and again for October, 1976. The rescheduling was required to allow Petitioner and Respondent to file motions and was conditioned upon the waiver by Respondent of his speedy trial rights. In a motion filed on September 14, 1976, Respondent waived any claim of violation of his federal constitutional right to a speedy trial. In the same motion, he, also, waived the time requirements of New Mexico's speedy trial rule. N.M.R.Crim. P. 37, N.M.S.A. 1978, for a period ending on October 31, 1977 to commence the trial. (R. 27176 at 1-4, 8-45, 47, 51, 70-82, 102-168, 192-208, 260-262); (Petition at App. 4).

Respondent, pursuant to Rule 37, applied to the New Mexico supreme court for four extensions of time for commencement of the trial of cause no. 27176. Petitioner did not object to these requests. Respondent supported its third request on the ground that the extension was necessary because of the number and subject matter of defense motions. Respondent's fourth request for extension was prompted by the trial court's ruling

that trial was precluded as a matter of law by Petitioner's insanity and its dismissal with prejudice of the indictment. Respondent appealed and the court of appeals of New Mexico reversed and remanded the cause for trial. The mandate of the court of appeals issued on November 7, 1977. The fourth Rule 37 extension was granted until March 21, 1978. (R. 27176 at 69, 83-99, 169, 189, 200-201, 209, 219, 245-253).

On remand, trial was set for February 28, 1978 and then re-set for March 13, 1978. On the latter date, Petitioner filed a motion to dismiss. The motion was granted because of the unauthorized presence of a secretary transcriber in the grand jury room. The dismissal was entered on March 14, 1978 and was without prejudice. Respondent, on March 17, 1978, filed a motion to amend the order of dismissal so that an appeal could be taken therefrom. Respondent also on that date applied for a fifth Rule 37 extension to protect itself if it decided to appeal. The extension was granted until September 15, 1978 by which to try the case. The trial court, however, never ruled on Respondent's motion and Respondent never appealed or initiated any further action on cause no. 27176. (R. 27176 at 252, 257-258, 267-268, 270-279, 288, 290); (Tr. Cr. 27176 at 35-109); (Petition at App. 4-5, 22-23).

Following the dismissal of cause no. 27176, Petitioner's attorney, in July, 1978, joined the district attorney's office which had filed the indictment against Petitioner. A special prosecutor was assigned, because of the conflict that arose in the office, to re-evaluate Respondent's case against Petitioner for presentation to a grand jury. (10/13/82, In chambers Tape 1A at 3-26); (Petition at App. 24 n.3).

In January, 1981, Respondent sought to re-indict Petitioner in cause no. 33830. A target letter was sent to Petitioner, advising of the re-indictment. On January 9, 1981,

Petitioner applied to the district court for a temporary restraining order to prevent the re-indictment. The district court denied the request, ruling that there was no bar to re-indictment. It specifically found that cause no. 27176 ended upon the March 14, 1978 dismissal from which no appeal was taken by Respondent and that Rule 37 did not bar the re-indictment. An indictment was returned on February 9, 1981 in cause no. 33830. The underlying charges were similar to those under cause no. 27176. (Tr. CV-81-00816 (Ct. App. 5064 at 2-17)); (R. 33830 at 1-3).

On January 22, 1981, Petitioner filed a motion to dismiss with prejudice cause no. 27176. His motion alleged a failure to abide by the Rule 37 extension, which allowed trial to commence by September 15, 1978. The district court granted the motion. Respondent appealed to the court of appeals. That court reversed the dismissal, holding that the cause ended on September 15, 1978. Respondent petitioned for writ of certiorari to the supreme court. The supreme court granted the petition. It agreed with the result reached by the court of appeals but not its reasoning. The supreme court concluded that cause no. 27176 had ceased to be upon the March 14, 1978 dismissal of the indictment from which no appeal was taken. It held, therefore, that the Rule 37 extension to September 15, 1978 had no effect and that the district court had no jurisdiction to enter its latest dismissal of cause no. 27176. (R. 27176 at 294, 296, 299-310, 310-312); (Petition at App. 4-5).

In cause no. 33830, Petitioner filed on March 16 and 30, 1981 a motion to dismiss and a memorandum in support, alleging violations of his right to a speedy trial and of Rule 37 by a failure to bring him to trial by September 15, 1978, and circumvention of Rule 37(d). Petitioner additionally filed eleven other motions on March 16 and 30, 1981. He agreed

with Respondent to a vacation of the April 27, 1981 trial date. The district court entered an order on May 7, 1981 in which it ruled against Petitioner on his claims of violations of speedy trial and Rule 37 rights. It granted Petitioner's motion on his claim of circumvention of Rule 37(d). (R. 33830 at 20, 22, 46-47, 61, 66-68); (4/28/81, Tape 1A at 555).

Respondent appealed to the court of appeals. Petitioner took no appeal from the district court's adverse rulings on his claims of violations of speedy trial and Rule 37 rights. The court of appeals dismissed Respondent's appeal on a jurisdictional ground, i.e., failure to timely file the notice of appeal. Respondent filed a petition for writ of certiorari to the supreme court. The petition was denied. Respondent next, pursuant to N.M.R. Crim. App. 202(c), N.M.S.A. 1978, filed in district court a motion for extension of time by which to file a notice of appeal. Upon good cause shown, the district court, under Rule 202(c), may extend the time by 30 days from the time prescribed for the filing of the notice. Respondent's motion was granted and Respondent filed a notice of appeal in the court of appeals on September 15, 1981. The court of appeals dismissed the appeal, holding that the district court did not have jurisdiction to grant the motion. (R. 33830 at 75-93, 94-111, 115-121).

On writ of certiorari to the supreme court, the court of appeals ruling was reversed. The supreme court stated that procedural time limits are stayed until after a decision is rendered by the appellate court. It held, therefore, that the district court did have jurisdiction to grant Respondent's motion after the appeal was dismissed for lack of jurisdiction. The supreme court stated that it so interpreted Rule 202(c), as it does all procedural rules, liberally "to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice." (Petition App. at 26). The supreme court also held that the district court's dismissal of cause no. 33830 was erroneous

because there was no circumvention of Rule 37, in light of the fact that the indictment under cause no. 27176 was dismissed pursuant to a defense motion. Neither party raised nor briefed the issue of the propriety of the district court's dismissal. The record before the supreme court, however, laid out the district court's ruling and the basis for the ruling. The supreme court, apparently, decided the issue under its inherent authority to correct rulings of the lower court which are erroneous as a matter of law. The supreme court remanded the case for trial and issued its mandate on June 21, 1982. (R. 33830 at 115-121).

Trial commenced in cause no. 33830 on October 13, 1982 and ended on October 22, 1982. Petitioner was found guilty of two counts of second degree murder and three counts of aggravated assault on a peace officer. (R. 33830 at 206).

Petitioner appealed his convictions to the court of appeals. He claimed a violation of his speedy trial right by a six and one-half-year delay between February, 1976, date of first indictment, and October, 1982, date of trial on the third indictment. His only allegation of prejudice was prejudice to his defense. Petitioner was at liberty during the entire six and one-half year period. In addition to appealing on a speedy trial violation ground, Petitioner appealed on the ground that he was denied due process by the five-year delay between his first indictment and his third indictment. The alleged prejudice suffered was prejudice to his defense. The court of appeals affirmed Petitioner's convictions, ruling against him on all his claims of error. The supreme court denied Respondent's petition for writ of certiorari. (Petition at App. 2-12).

(a) Federal Question Raised.

On March 16, 1981, Petitioner filed in district court a motion to dismiss the indictment in cause no. 33830, alleging inter alia a violation of his right to a speedy trial.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner imprudently requests this Court to exercise its review on writ of certiorari which review is a matter of judicial discretion and not of right. The questions raised by the petition in this case are of minor importance in the overall development of the law on the Speedy Trial Clause of the Sixth Amendment. The few decisions rendered since *United States v. MacDonald*, 456 U.S. 1 (1982), which deal with factual situations similar to that involved in this case do not conflict with the decision reached in this case by the court of appeals of New Mexico or with the principles set out in *MacDonald*. An examination of the record shows that the result reached in this case is fair.

1. Questions Presented Are of Minor Importance.

The questions posed by Petitioner have minor importance in the overall development of the law on the Speedy Trial Clause. The Clause is applicable to the states through the Fourteenth Amendment, United States Constitution. *Klopfer v. California*, 386 U.S. 213 (1967). In *MacDonald* the Court determined that the period between the dismissal of an indictment by the government, acting in good faith, and the subsequent re-indictment does not implicate the Speedy Trial Clause. Petitioner incredibly asks this Court to conclude that *MacDonald* is inapposite to his factual situation because the dismissal of the second indictment was occasioned by a defense motion to dismiss. No appeal was taken by Respondent from the dismissal. No further action was pursued by Respondent against Petitioner under the dismissed indictment. Petitioner

was at liberty, free from the anxiety of public accusation and of criminal prosecution.

Petitioner seeks to have this Court reach conflicting conclusions on the basis of superficial distinctions, significant only for their form and not for their substance. Nothing said in *MacDonald* draws any distinction between dismissals occasioned by the filing of a nolle prosequi by the government and those occasioned by a filing of a motion to dismiss by a defendant. *MacDonald* indicates that dismissals brought about by the government, acting in good faith, are like, if not extensions of, dismissals brought about by defense motions to dismiss. Specifically, the Court in discussing the position of the federal courts of appeals on the issue before the Court stated that most of them "considering this issue have also reached the conclusion that the period after the dismissal of initial charges is not included in determining whether the Speedy Trial Clause has been violated." *MacDonald, supra*, at 456 U.S. 7 n. 7.

A review of those cases cited by the Court for that proposition reveals that at least one of them involved a dismissal of an indictment pursuant to a defense motion to dismiss. *United States v. Bishton*, 150 U.S. App. DC 51, 463 F.2d 887 (1972). In another case, the initiator of the dismissal of the indictment is not identified. *United States v. Martin*, 543 F.2d 577 (CA 6 1976), *cert. denied*, 429 U.S. 1050 (1977).¹ In both cases, the courts held that the Speedy Trial Clause was inapplicable during the period between dismissal of the indictment and the re-indictment.

¹. Respondent submits that it is more likely than not that the initiator of the dismissal in *Martin* was the defense. A dismissal occasioned by the government would have led the court to discuss the propriety of the dismissal. Compare *Martin, supra*, with *MacDonald, supra*, and *United v. Alvalos*, 541 F.2d 1100 (1976), *cert. denied*, 430 U.S. 970 (1977).

Martin and *Bishton* each relied upon the rationale of *United States v. Marion*, 404 U.S. 307 (1971) "that the right to a Speedy Trial attaches when a prosecution has begun, either by indictment or by the 'actual restraints imposed by arrest.' " *Bishton*, *supra*, at 887. See *Martin*, *supra*, at 579. The *MacDonald* court also relied upon the *Marion* rationale in reaching its holding. *MacDonald*, *supra*, at 456 U.S. 6. The *Bishton* court explicitly determined that a person cannot lay claim to the speedy trial right for a "period between the end of one prosecution and the beginning of another, even when the two arise from the same occurrence" when he stands neither arrested nor indicted for an offense nor suffers actual restraints on his liberty or public accusation. *Bishton*, *supra*, at 891. That person's situation is unlike that of one who has been arrested and is held to answer to a charge. *Id.* Bad faith on the part of the government in delaying re-indictment may be a factor to be considered in determining whether the Speedy Trial Clause is applicable during the period between the dismissal of an indictment occasioned by a defense motion and the re-indictment. See *Bishton*, *supra*. In the absence of any such bad faith, *Bishton*, *Martin* and *MacDonald's* reliance on them instruct that there is no distinction under the Speedy Trial Clause between dismissals occasioned by the defense and those occasioned by the government.

Nothing is to be gained by further scrutiny of the Clause to satisfy Petitioner's argument which attempts to create a distinction on superficial grounds. Where a person is at liberty, free from the anxiety of public accusation and criminal prosecution, and cannot be again subjected to such anxiety or to actual restraints except upon re-indictment, it should not matter under the Speedy Trial Clause whether his liberty results from a defense motion to dismiss or from a nolle prosequi filed by the government. Respondent submits that the Clause instructs that it does not matter.

2. Limited Applicable Case Law and No Conflict.

An exercise of judicial discretion should be guided by a sufficient number of varied views, dealing with the issue for which the exercise is sought. Such is not the case here. If this Court were to grant the petition, it would find a paucity of decisions rendered since *MacDonald* dealing with factual situations similar to that before the bar. This Court would also find that these decisions do not conflict with that rendered by the court of appeals of New Mexico or with *MacDonald*.

Respondent has only found three opinions involving a dismissal occasioned by a defense motion and the question of the implication of the Speedy Trial Clause on the period between the dismissal and the subsequent re-charging. *United States v. Samples*, 713 F.2d 298 (7th Cir. 1983); *United States v. Loud Hawk*, 564 F. Supp. 691 (D.C. Oreg. 1983); *State v. Bailey*, 655 P.2d 494 (Mont. 1982). None are supportive of Petitioner's arguments.

In *Samples*, following dismissal of two counts of an indictment for improper venue and pursuant to a defense motion to dismiss, the government, like the State here, took no appeal. Twenty months later the defendant was re-indicted on the two dismissed counts in the court of proper venue. Relying upon *MacDonald*, the *Samples* court held that the Speedy Trial Clause was inapplicable during the twenty-month period. The court stated that "(i)t is scarcely realistic to suppose that a citizen, free from criminal charges, wants or deserves a speedy trial. Once all counts of the indictment were dismissed, the defendant 'was legally and constitutionally in the same posture as though no charges had been made' " *Samples, supra*, at 298. The defendant was not an accused.

In *Loud Hawk* and *Bailey*, the courts distinguished *MacDonald*, finding that each defendant before the court was

technically an accused following the dismissal of the cause pursuant to a defense motion to dismiss. The *Bailey* court determined that the accused status did not end because of the government's continued efforts, after the dismissal, to charge the defendant under the dismissed information. In essence, the court found that there was but one cause of action continuously pursued by the government. The government's efforts were concerned with the filing of motions seeking permission to file the information.

The court in *Loud Hawk* was faced with the question "whether a person is 'accused' during the time a court's dismissal of the indictment, on defendant's motion, is on appeal." *Loud Hawk, supra*, at 696. It answered in the affirmative. But one prosecution exists when the government appeals a dismissal. On appeal, there exists the possibility of reversal of the dismissal. "A person (thus) remains under prosecution unless and until the court on appeal affirms the dismissal." *Id.* While he awaits the outcome of the appeal, he suffers the anxiety of knowing the possibility of reversal.

Samples, Loud Hawk and *Bailey* stand for the proposition that a prosecution ends and a person is not an accused following a dismissal of an indictment or information occasioned by a defense motion to dismiss, if the government takes no appeal and otherwise ceases its efforts to prosecute the person under the dismissed indictment or information. This proposition is in accord with *MacDonald*. In substance, the government's decision not to appeal and to cease all efforts to prosecute under the dismissed cause is a declaration of its voluntary dismissal as much as the filing of a nolle prosequi is such a declaration. Said another way, it matters not for speedy trial purposes who initiates the dismissal, i.e., the defense or the government, but rather whether the government's actions following the dismissal demonstrate that the cause ended upon the dismissal.

In essence, the court of appeals of New Mexico determined, in reliance upon *MacDonald*, that the government's actions are indicative of whether a prosecution ends following a dismissal prompted by a defense motion to dismiss. Its determination and denial of Petitioner's speedy trial claim are in accord with *Sample*, *Loud Hawk* and *Bailey*, for it is clear from the record that the government took no appeal from the dismissal and ceased all efforts to prosecute Petitioner under the dismissed indictment. It is equally clear that Petitioner was at liberty and free from criminal prosecution during the period between dismissal and re-indictment. Respondent thus submits that, in light of the agreement among this case, *MacDonald* and the limited case law since *MacDonald*, that this Court's exercise of judicial discretion would be wanting in guidance to rule in Petitioner's favor.

3. A Fair Result.

This Court may feel prompted by allusions to questionable conduct on the part of Respondent and the appellate courts of New Mexico (Petition at 8-11, 14) to issue the writ in a belief that the result reached in this case was correct but not fair. Petitioner has alleged that he remained under the specter of criminal charges after the dismissal of the indictment in cause no. 27176. (Petition at 14). He has further alleged that Respondent employed "confusing legal maneuvers" to obtain review in the supreme court of a dismissal of an appeal in cause no. 33830 by the court of appeals. (Petition at 10). Allegations of improper review of the dismissal of the indictment in cause no. 33830 and of cursory review of his speedy trial claim by the court of appeals have also been made. (Petition at 8, 10-11). In sum, Petitioner has cast a negative light over the entire proceedings against him, in addition to alleging a violation of his right to a speedy trial. The record, however, is not supportive of Petitioner's contentions and explicitly

demonstrates the fairness of the treatment accorded to Petitioner.

Petitioner was not an accused following the dismissal of the indictment in cause no. 27176. No appeal or other actions under the dismissed indictment were pursued by Respondent. Petitioner was not subjected to public accusation or criminal prosecution. His allegations of being haunted by criminal charges cannot change the fact of his non-accused status in light of these facts.

If Petitioner were haunted by criminal charges, and the record does not demonstrate that he was, then it nevertheless can be said that he was in a better position than one who was "painfully aware" of an on-going investigation, who made repeated inquiries regarding the process of the investigation, and who retained counsel during the interim between the dismissal and re-indictment. *MacDonald, supra*, at 456 U.S. 18-19. Yet that person was not an accused and this Court found no need to say that the government "caused", unfairly or otherwise, a specter of criminal charges, warranting the application of the Speedy Trial Clause. That need does not arise in this case where the allegation of specter of criminal charges is suspect and the showing of complicity by Respondent in causing the specter is absent.

Petitioner's allegation of the employment of confusing legal maneuvers by Respondent is curious. What has been classified as confusing boils down to Respondent's taking of an appeal of the dismissal of the indictment in cause no. 33830, applying for certiorari to the supreme court after the appeal was dismissed for failure to timely file it, applying to the district court for a motion to extend the time for filing the notice of appeal after the supreme court denied the application, filing a new appeal after grant of its motion, and applying for and receiving permission to proceed on writ of certiorari to the supreme

court to review the court of appeals dismissal on a jurisdictional ground of Respondent's appeal. Contrary to Petitioner's contentions, these acts by Respondent are indicative of an orderly pursuit to have an appeal heard. Respondent has a constitutional and statutory right to appeal a dismissal of its indictment. Art. VI, Sec. 2, N.M. Const.; Section 39-3-3B, N.M.S.A. 1978.

The supreme court in considering the jurisdictional ground raised by Respondent's petition also considered the merits of the dismissal of the indictment by the district court. Petitioner's allegation of impropriety goes to this latter review. Respondent submits that where the issue is clear and the error of the lower court's ruling is plain on the face of the record, a defendant is denied no rights by a review by the appellate courts without benefit of briefs. See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Silber v. United States*, 370 U.S. 717 (1962).

Petitioner, lastly, has alleged that the court of appeals conducted a cursory review of his claim of violation of speedy trial rights. Respondent answers that the review conducted by that court was brief but not cursory. That the court's review was not cursory is evidenced by its careful discussion of the facts and case law pertinent to the consideration of Petitioner's claim. (Petition at App. 3-6, 10-12).

As a particular look at Petitioner's allusions to questionable conduct by Respondent and the appellate courts demonstrate the absence of overreaching and the fairness of the result reached, likewise does a general look at the proceedings under the indictments and the period between indictments. Delays in the prosecution under indictment in cause no. 27176 were occasioned by the filing of many motions and resultant appeals and not by the advancement of tactical strategies by Respondent. Most of the motions were filed by Petitioner. Petitioner filed a waiver of his right to a speedy trial because of his desire to have the motions heard. Following the dismissal of the

indictment, Respondent left Petitioner alone, free from criminal prosecution. The re-indictment was the declaration of a new prosecution, resolution of prosecutorial conflicts, and the appointment of a special prosecutor. Prosecution under the new indictment was again delayed by the filing of motions by Petitioner. Those motions led to appeals. Upon resolution of the motions and the appeals, trial commenced with Petitioner's putting on sufficient evidence to support his defense. (Petition at App. 9). His evidence conflicted with that of Respondent. *Id.* The convictions were obtained upon the settling of the conflict in Respondent's favor based on the strength of Respondent's case and not through overreaching by Respondent. In sum, Respondent obtained the convictions against Petitioner through fair play. The result reached by the court of appeals is thus a fair one.

CONCLUSION

Respondent, New Mexico, respectfully requests this Court to deny the writ of certiorari. The exercise of the Court's discretion in favor of the questions raised by the petition will add nothing of significance to the law on the Speedy Trial Clause. The result reached by the court of appeals of New

Mexico is in accord with *MacDonald* and the limited applicable case law. The result is also a fair one.

Respectfully submitted,

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April 17, 1984

APPENDIX A

N.M.R.D.Ct. 37, N.M.S.A. 1978.¹

Rule 37. Time limits; time of commencement of trial.

(a) Arraignment. The defendant shall be arraigned on the information or indictment within fifteen days after the date of filing of the information or indictment or the date of arrest, whichever is later.

(b) Trial. The trial shall be commenced within six months after the date of filing in the district court of the complaint, information, indictment or notice of appeal from the magistrate court or the date of arrest, whichever is later. In the event of a new trial, mistrial or reversal of a conviction on appeal, a subsequent trial shall be commenced within six months after the date of the order granting the new trial, the declaration of the mistrial or the mandate of the appellate court.

(c) Extension of time. The time for commencement of trial as specified in the preceding paragraph may be extended only by the supreme court of New Mexico, a justice thereof, or a judge designated by the supreme court, for good cause shown. The party seeking an extension of time beyond the six-month period shall, within said six-month period, file with the clerk of the supreme court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause and forthwith serve a copy thereof on opposing counsel. Hearings on such petitions will be held in Santa Fe, or such other place as may be designated by the supreme court, on five days' notice to the parties.

¹. The Rule 37 cited in the petition (Petition at 3-4) was not the rule applicable during the period when Respondent applied for extensions for commencement of trial.

(d) Effect of noncompliance with time limits. In (the) event the trial of any person described in Paragraph (b) of this rule does not commence within the time therein specified, or within the period of any extension granted as provided in this rule, the information or indictment filed against such person shall be dismissed with prejudice, unless the supreme court finds that the defendant is responsible for failure to comply with the time limits. If the supreme court finds that the defendant is responsible for the failure to comply with the time limits, the defendant not in custody may have his release revoked unless there is good cause shown for the failure to comply.

(e) Definition of "in custody." As used in this rule, "in custody" means custody on the charge contained in the information or indictment. [As amended, effective April 1, 1976.]